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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 1736

GEORGE J. DARNEILLE *et al.*,

Petitioners,

v.

MICHAEL CARO,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Statement

Petitioners herein (hereinafter "defendants") seek a writ of certiorari to review an interlocutory order of the United States Court of Appeals for the Second Circuit dated January 9, 1980 (1a*) holding that the District Court,

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* References to "a" are to the Appendix to the petition for certiorari.

had violated the mandate of the Court of Appeals (4a) as embodied in the Court of Appeals prior interlocutory orders of January 17, 1979 (14a) and March 7, 1979 (16a)in denying respondent's motion for intervention in this federal securities class action, . Defendants seek to review the correctness of the Court of Appeals' orders of January 17, 1979 and March 7, 1979, though the time in which to file a petition for certiorari to review those orders has long since expired.

This action is brought as a class action upon behalf of all persons who owned the common stock of Westates Petroleum Corporation ("Westates") on February 1, 1977, the record date for determining the shareholders of Westates who were entitled to share in the proceeds of the liquidation of Westates. The common stock of Westates had been listed and traded on the American Stock Exchange. The complaint alleges violations of Sections 10(b) and 13(d) of the Securities Exchange Act of 1934 and Regulations 10b-5 and 13 thereunder, as well as a pendent claim for common law breach of fiduciary duty.

In essence, the complaint alleges a scheme by the defendants (officers and directors of Westates and tippees acting in concert with them) to purchase the common stock of Westates upon the open market with the inside information that Westates would be liquidated at a much higher price per share of common stock. A mere seven

weeks after defendants had completed purchasing 293,000 shares of Westates stock at an average price of $3.24 per share, Westates publicly invited offers to buy substantially all of its assets and thereafter Westates liquidated at between $10.70 and $11.10 per share. The profits realized by the defendants through this fraudulent scheme were at least $2,251,735.

The complaint seeks, in effect, disgorgement by defendants of their illegal profits to the thousands of other persons who, exclusive of defendants, owned Westates common stock as of the record date for sharing in the proceeds of Westates' liquidation. Since all such stockholders of Westates are similarly situated and since all question of law and fact are common to them, this is a paradigmatic class action.

In an opinion dated January 6, 1978 (48a), the District Court found that the complaint stated a cause of action under Sections 10(b) and 13(d) of the 1934 Act and denied the motion to dismiss the complaint. Respecting Section 10b, the District Court determined that plaintiff and the other members of the class were "forced sellers".

Thereafter, certain of the defendants moved for reargument or, alternatively, for certification, pursuant to 28 U.S.C. §1292(b), of the order denying the motion to dismiss. In an opinion dated March 22, 1978 (37a), the District Court denied certification

or reargument, except that the District Court dismissed the Section 13(d) claim.

However, the motion of plaintiff, Samuel Weisman, for class certification was denied by the District Court by opinion dated April 19, 1978 (32a) upon the ground that plaintiff was an inadequate class representative. Defendants thereafter tendered plaintiff Weisman his individual damages of $271.40 (inclusive of costs) which tender **was not accepted** by plaintiff. Instead, plaintiff continued to litigate the action and sought to commence discovery by moving for the production of documents (23a-24a, 30a-31a). Defendants then moved to dismiss the action as moot. By opinion dated July 14, 1978 (19a), the District Court held that the action and also plaintiff's motion for production of documents were moot and judgment dismissing the action as moot was entered on July 27, 1978 (18a).

Plaintiff Weisman then appealed to the Court of Appeals and briefs were filed and oral argument duly had. The question whether defendants could, after denial of class certification, moot this action by tendering Weisman his individual damages of $271.40 (inclusive of costs) was fully briefed and argued before the Court of Appeals upon plaintiff Weisman's appeal (Docket No. 78-7422) from the judgment of the District Court dismissing this action as moot.

In addition to arguing that defendants could not moot this class action by tendering plaintiff Weisman his individual damages, plaintiff further argued in his briefs that the decision of the District Court denying class certification upon the ground that plaintiff was an inadequate class representative was erroneous and that, in any event, provision should be made for protection of the class by notice to the class members (pl's brief, pp. 52-54; pl's reply brief, pp. 25-27). In this connection, plaintiff emphasized that defendants' answers in this action pleaded the defense of the statute of limitations (pl's reply brief, pp. 8-9, 26). Defendants' brief (pp. 41-44) opposed the giving of any notice to the members of the class.

Subsequent to oral argument, plaintiff Weisman, aged 77, requested that the appeal be dismissed because of the critical illness of himself and his wife.* By order dated January 17, 1979 (14a) which was subsequently filed in the District Court as the mandate, the Court of Appeals dismissed the appeal, with, however, the express proviso that the "order [of dismissal] shall not prejudice the right of another plaintiff to enter the suit within 30 days." The Court of Appeals' order of January 17, 1979 reads as follows:

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*The letter of plaintiff's counsel to the Court of Appeals (which enclosed letters from plaintiff and plaintiff's son) are set forth at pp. 57-59 of the Joint Appendix in the Court of Appeals.

> "Appeal from the United States District Court for the Southern District of New York.
>
> This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.
>
> ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that, because the appellant, who has been found by the District Court to be an inadequate class representative, has indicated that he no longer wishes to be a plaintiff in this lawsuit, the appeal be dismissed. This order shall not prejudice the right of another plaintiff to enter the suit within 30 days" (emphasis supplied).

On February 2, 1979 respondent, Michael Caro, a member of the class, moved to intervene in this action pursuant to the leave specifically granted in the Court of Appeals order of January 17, 1979 (3a). Certain defendants then moved in the Court of Appeals on February 15, 1979 (3a, 16a) for "modification of panel order" upon the ground that, upon the withdrawal of Weisman, the sole plaintiff-appellant, no case or controversy existed which would support intervention and that accordingly the Court of Appeals order of January 17, 1979 should be modified

to provide that the order was without prejudice to the right of another plaintiff to file suit based upon the same facts.

By letter dated February 20, 1979, plaintiff's counsel advised the Court of Appeals that it was not filing an answer to defendants' motion for "modification" because it was in reality an untimely petition for rehearing. Defendants then moved the Court of Appeals by motion dated February 21, 1979 to have its motion for "modification" be "deemed to be a timely motion for reconsideration, should the Court deem that to be appropriate". By order dated March 7, 1979, the Court of Appeals granted defendants' motion to have its motion for "modification" be deemed to be a timely motion for reconsideration. By separate order also dated March 7, 1979 (16a), the Court of Appeals denied defendants' motion to modify its order of January 17, 1979 permitting intervention by another member of the class within 30 days, stating as follows:

> "It is hereby ordered that the motion made herein by counsel for the appellees Darneille and Daum by notice of motion dated February 15, 1979 to modify the Court's decision of January 16, 1979 be and it hereby is denied. Because class certification has been denied, 'it does not...follow that the case must be treated as if

there never was an action brought on behalf of absent class members.' United Airlines, Inc. v. McDonald, 432 U.S. 385, 393 (1977), quoting Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 461 (E.D. Pa. 1968)."

Notwithstanding the Court of Appeals express decisions (set forth in its orders of January 17, 1979 and March 7, 1979) specifically rejecting defendants' contentions that no case or controvery existed because of plaintiff Weisman's withdrawal of his appeal and specifically permitting intervention by another member of the class, the District Court denied the motion by respondent, Michael Caro, a member of the class, for intervention upon the ground that there is "no action pending". The memo endorsement of the District Court, dated March 14, 1979 (9a), denying intervention reads as follows:

"The motion of Michael Caro to intervene in this action as a party plaintiff is denied without prejudice to his right to commence a new action based on the acts alleged in this action. Our dismissal of Weisman's action has not been appealed, and there is, therefore, no action pending in which Caro can intervene. Tilley Lamp Co. v. Thacker, 454 F.2d 805 (5th Cir. 1972). Additionally, Caro does not

> seek to intervene to appeal the denial of Weisman's motion for class certification, and, thus, the Supreme Court's decision in United Air Lines, Inc. v. McDonald, 432 U.S., 385 (1977), is not applicable.
>
> So ordered."

By petition dated April 10, 1979, respondent Caro filed in the Court of Appeals an application for a writ of mandamus to compel obedience to the mandate of the Court permitting timely intervention in this class action by another member of the class. Caro also filed a notice of appeal from the order of the District Court denying intervention out of an abundance of caution as a safeguard against the contingency that the petition for mandamus might fail. Defendants opposed appellant's petition for mandamus upon the ground, inter alia, that mandamus will not issue where an appeal lies. By order dated June 8, 1979, the Court denied appellant Caro's petition for mandamus and granted Caro's motion to reinstate this appeal which had been dismissed for failure to perfect it.

After oral argument was duly had upon respondent Caro's appeal from the order of the District Court denying his motion for intervention, the Court of Appeals, by order dated January 9, 1980 (1a), reversed the District Court's order of denial and remanded the matter to the District Court with instructions to consider the application of Caro for

intervention in accordance with the provisions of Rule 24 of the Federal Rules of Civil Procedure. The express ground for the Court of Appeals reversal of the District Court was that "the district court has failed to comply with the mandate of this Court", as embodied in the Court of Appeals prior orders of January 17, 1979 (dismissing plaintiff Weisman's appeal without prejudice to the right of another plaintiff to enter the suit within thirty days) and of March 7, 1979 (denying defendants' motion for modification of such order of January 17, 1979). Finally, by order dated February 27, 1980 (6a, 8a), the Court of Appeals denied defendants' petition for rehearing and rehearing in banc.

Reasons for Denying the Writ

I

The Time In Which To File A Petition For Certiorari To Review The Correctness Of The Court Of Appeals Prior Orders Of January 17, 1979 And March 7, 1979 (Holding That The Voluntary Dismissal Of The Original Plaintiff's Appeal Would Be Without Prejudice To The Right Of Another Plaintiff To Enter The Suit Within Thirty Days) Has Expired.

It is clear beyond cavil that, in denying respondent Caro's motion for intervention upon the ground that there is "no action pending" (9a), the District Court had not followed the mandate of the Court of Appeals as

embodied in the Court of Appeals' orders of January 17, 1979 and March 7, 1979. The Court of Appeals prior order of January 17, 1979 specifically stated that the "order [of dismissal] shall not prejudice the right of another plaintiff to enter the suit within 30 days" (15a); and in its order of March 7, 1979 denying defendants motion for reargument, the Court of Appeals further specifically stated that, because class certification has been denied, it does not follow that the case must be treated as if there never was an action brought on behalf of absent class members (16a-17a).

These orders of the Court of Appeals clearly ruled that this action is sufficiently alive to permit timely intervention by another member of the class and the District Court in effect purported to overrule these orders by denying a timely motion for intervention upon the ground there is "no action pending". The District Court was obliged to obey the mandate of the Court of Appeals whether it was right or wrong.

The Court of Appeals' order dated January 9, 1980 did not decide to permit intervention by another member of the class. That decision had already been made in the Court of Appeals prior orders of January 17, 1979 and March 7, 1979 (which defendants did not seek a writ of certiorari to review).

Instead, the order of January 9, 1980 explicitly reversed the District Court for failure to comply with the

Court of Appeals' mandate. "Because the district court has failed to comply with the mandate of this Court, we reverse." (4a) The remainder of the Court of Appeals order of January 9, 1980 (4a-5a) merely explains the rationale of its prior orders of January 17, 1979 and March 7, 1979 permitting intervention.

The only person with standing to appeal the District Court's order denying class certification upon the ground that plaintiff Weisman was, for reasons personal to Weisman, an inadequate class representative was Weisman himself. For this reason, the Court of Appeals prior orders of January 17, 1979 and March 7, 1979 did not permit intervention for the purpose of prosecuting plaintiff Weisman's appeal but instead dismissed the appeal without prejudice to the right of another plaintiff to enter the suit within thirty days.

Since the order of January 9, 1980, holding that the District Court had violated the Court of Appeals' mandate is manifestly correct and since the time in which petition for certiorari to review the prior orders of January 17, 1979 and March 7, 1979 has long since expired, no basis whatsoever exists for the issuance of a writ of certiorari by this Court. When and if a final judgment adverse to defendants is entered in the District Court and is affirmed by the Court of Appeals, defendants may, if they are then so advised, challenge the correctness of the Court of Appeals prior

interlocutory orders of January 17, 1979 and March 7, 1979 (permitting intervention by another member of the class) upon petition for certiorari to this Court for review of such final judgment. Hanover Shoe, Inc. v. United States Shoe Machinery Co., 392 U.S. 481, 488, n.6 (1968); Mercer v. Theriot, 377 U.S. 152, 153-154 (1964); Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418 (1923); Hamilton-Brown Shoe Co. v. Wolf Brothers, 240 U.S. 251, 257-258 (1916).

II

In The Particular Circumstances, It Was An Entirely Proper Exercise Of Discretion For The Court Of Appeals To Permit Intervention By Another Member Of The Class. In Any Event, Such Particular Exercise Of Discretion In A Unique And Non-Recurring Factual Situation Does Not Warrant Review By This Court

The Court of Appeals orders of January 17, 1979 and March 7, 1979, permitting intervention by another member of the class, represents, in the particular circumstances in which they were entered, an entirely proper exercise of discretion.

The prior orders of January 17, 1979 and March 7, 1979 correctly anticipated this Court's subsequent decision in Deposit Guaranty National Bank v. Roper, 100 S.Ct. 1166 (1980), holding that defendants could not moot a class action, after denial of class certification by the District Court, by tendering the named class

representative (Weisman) his individual damages where, as here, the named class representative refused to accept such tender of individual damages. Instead, plaintiff Weisman continued to litigate this action, making, for example, a motion for production of documents and arguing strenuously that a dismissal for mootness would undermine the policies behind Rule 23 Fed. R. Civ. P. (23a-24a); and when the District Court dismissed the action for mootness, Weisman appealed such dismissal to the Court of Appeals.

However, after oral argument, Weisman, aged 77, requested that the appeal be dismissed because of the critical illness of himself and his wife. At that point, the Court of Appeals was confronted with the question of what, if anything, should be done to protect the interests of absent class members, particularly in view of the statute of limitations problems involved (4a). The action was not mooted by defendants' tender of individual damages because, as stated, plaintiff Weisman had not, and has never, accepted such tender. Plaintiff Weisman desired to discontinue as the representative of the class because of the critical illness of himself and his wife. Plaintiff Weisman's desire to discontinue was thus completely unrelated to defendants' tender of individual damages and therefore this action is controlled by this Court's decision in Deposit Guaranty National Bank v. Roper, supra.

In these circumstances, it was not an abuse of discretion for the Court of Appeals to condition the voluntary dismissal of the appeal with the proviso that the dismissal would be without prejudice to the right of another plaintiff to enter the suit within thirty days. Rule 42(b) of the Federal Rules of Appellate Procedure specifically provides that the Court may fix terms or conditions for voluntary dismissal by an appellant. See, in this connection, the decisions cited by the Court of Appeals in its order of Janaury 9, 1980, namely, United Airlines, Inc. v. McDonald, 432 U.S. 385, 392 (1977) (permitting intervention by another class member where, after denial of class certification, the named class representatives settled their individual claims, after which a judgment of dismissal was entered); Shelton v. Pargo, Inc., 582 F.2d 1298, 1304-16 (4th Cir. 1978) (district court may, in its discretion, require notice to absent putative class members if it determines proposed settlement of individual claims of named class representatives prior to class certification is collusive or prejudicial); Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971) (notice required to be given to absent members of putative class where named class representative settled his individual claim before class certification); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 460-61 (E.D. Pa. 1968) (because class certification has been denied "it does . . . not follow that the case must

be treated as if there never was an action brought on behalf of absent class members"). See, additionally, Note, "Developments - Class Actions", 89 Harvard Law Review 1318, 1546 (1976) ("where dismissal is based on a problem of inadequacy of representation which a different plaintiff might be able to correct, notice should normally be ordered to protect possible reliance.") (emphasis supplied).

Here, the Court of Appeals did not require, or even permit, notice to absent class members. Instead, the Court of Appeals took the more modest step of merely permitting timely intervention by another class member. Such exercise of discretion, in the particular circumstances, certainly was not arbitrary or capricious. In any event, such an exercise of discretion in a unique and non-recurring factual situation plainly does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Dated: June 23, 1980

Respectfully submitted,

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